

1 || \*\* E-filed November 23, 2011 \*\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

11 MARTIN DELGADO; RICARDO  
12 DELGADO; ANGEL MARTINEZ; and  
ADRAIN ACOLTZI, on behalf of  
themselves and all those similarly situated,

No. C10-02799 HRL

14 Plaintiffs,  
15 v.  
16 MARIA DEANDA and RUBEN DEANDA  
dba GUADALAJARA MARKET; and  
DOES 1-10.

**ORDER THAT CASE BE ASSIGNED  
TO A DISTRICT JUDGE**

## **REPORT AND RECOMMENDATION**

**[Re: Docket No. 18]**

17 Defendants.  
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## Defendants.

Martin Delgado, Ricardo Delgado, Angel Martinez, and Adrain Acoltzi (“Plaintiffs”) sued Maria and Ruben Deanda dba Guadalajara Market alleging wage and hour violations of the federal Fair Labor Standards Act and various provisions of the California Labor and Business and Profession Codes. See generally, Docket No. 1 (“Complaint”). Plaintiffs were hourly workers at the Guadalajara Market, where they allege they often worked ten, twelve, or more hours per day without meal breaks or being paid the appropriate overtime rate. Id., p. 4. In addition, they claim defendants instructed them not to punch time cards, or to punch only 40 hours per week. Docket No. 28, p. 9 (“Application for Default Judgment” or “Application”). Plaintiffs brought this putative class action claim on behalf of themselves and the dozens of other hourly workers who might have been

1 similarly affected.<sup>1</sup> Complaint, p. 2. The defendants were served on September 2, 2010, but have yet  
 2 to appear in this action. See Docket No. 5. On November 8, 2010, plaintiffs moved for entry of  
 3 default against the defendants, which the Clerk of Court entered on November 10. Docket Nos. 12,  
 4 14. Plaintiffs now apply for default judgment against the defendants. Docket No. 18. Upon  
 5 consideration of the moving papers, the court recommends that plaintiffs' application for default  
 6 judgment be granted.

7 **LEGAL STANDARD**

8 Generally, a party is in "default" if the party has failed to plead or "otherwise defend" in a  
 9 timely fashion to a pleading seeking affirmative relief against the party. Fed. R. Civ. P. 55(a).

10 After entry of default by the Clerk, courts are authorized to grant default judgment in their  
 11 discretion. See FED. R. CIV. P. 55; Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). A court  
 12 may consider the following factors in deciding whether to enter default judgment: (1) the possibility  
 13 of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of  
 14 the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning  
 15 material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy  
 16 underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel v. McCool,  
 17 782 F.2d 1470, 1471-72 (9th Cir. 1986). In considering these factors, all factual allegations in the  
 18 plaintiff's complaint are taken as true, except those relating to damages. TeleVideo Sys., Inc. v.  
 19 Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

20 **DISCUSSION**

21 A. Entry of Default Judgment

22 The Eitel factors favor entry of default judgment. Plaintiffs' claims have merit and are  
 23 sufficiently pled. Once the Clerk of Court enters default, all well-pled allegations regarding  
 24 liability are taken as true except as to the amount of damages. Fair Hous. of Marin v. Combs, 285  
 25 F.3d 899, 906 (9th Cir. 2002); Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977).  
 26 Upon review of the complaint, the court finds that plaintiffs adequately pled each of their claims for  
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28 <sup>1</sup> However, the plaintiffs have not pursued any efforts to certify a class, and the court will treat the  
 putative class as abandoned. Therefore, no ruling in this matter shall be deemed to prejudice any  
 other potential claimant from seeking relief against defendants in the future.

1 relief. Since all liability-related factual allegations are taken as true, there can be no dispute over  
2 material facts. Additionally, plaintiffs would be prejudiced if default is not entered because  
3 defendants have refused or failed to participate in this action since it was filed nearly 18 months ago,  
4 and they have no other avenue for relief. Further, there is no evidence that defendants' failure to  
5 appear and defend themselves is due to excusable neglect. Since the defendants have failed to  
6 appear in this action, plaintiffs' only recourse is a default judgment. While the Federal Rules of  
7 Civil Procedure and this court favor judgments on the merits, defendants' refusal to participate in  
8 this litigation render such a decision impossible. Finally, "default judgment is disfavored when a  
9 large amount of money is . . . unreasonable in light of defendant's actions." *United States v.*  
10 *Ordonez*, 2011 U.S. Dist. LEXIS 50765, \*6 (E.D. Cal. May 11, 2011) (finding that over \$300,000  
11 was appropriate for resolution by default judgment when plaintiff's allegations supported the sum).  
12 Here, the sum of money requested, \$347,745.03, is reasonable in light of plaintiff's claims and  
13 evidence.

14 Therefore, the court recommends that plaintiffs' application for default judgment against  
15 defendants Maria Deanda and Ruben Deanda, dba Guadalajara Market be granted.

16 **B. Relief Requested**

17 As entry of default judgment is warranted, the court must determine the terms of the judgment.  
18 The moving party has the burden to prove up damages. *Amini Innovation Corp. v. KTY Intern.*  
19 *Marketing*, 768 F. Supp. 2d 1049, 1053-54 (C.D. Cal. 2011). The court need not hold a hearing  
20 when it can determine damages "by computation from facts of record." *Pope v. United States*, 323  
21 U.S. 1, 12 (U.S. 1944). In this case, plaintiffs claim: (1) unpaid wages under Cal. Lab. Code § 1194;  
22 (2) liquidated damages in the amount of unpaid wages under FLSA, 29 U.S.C. 216(b); (3) 30 days  
23 of wages owed as a penalty under Cal. Lab. Code § 201 for failing to pay overtime earned at the  
24 time plaintiffs were terminated; (4) restitutionary damages in the amount of unpaid wages under  
25 Cal. Bus. & Prof. Code § 17203; (5) pre-judgment interest of 10% of the unpaid overtime  
26 compensation pursuant to Cal. Lab. Code § 1194; and (6) attorney's fees and costs of suit under Cal.  
27 Lab. Code § 1194 and 29 U.S.C. 216(b). See Complaint pp. 10-11.  
28

1 Plaintiffs argue that where defendants have offered no work schedules to rebut plaintiffs' 2 allegations of the number of overtime hours worked, plaintiffs should be taken at their word insofar 3 as it is reasonable. Where an employer fails to provide accurate or adequate records, an employee 4 satisfies his evidentiary burden by showing "that he has in fact performed work for which he was 5 improperly compensated and if he produces sufficient evidence to show the amount and extent of 6 that work as a matter of just and reasonable inference." Anderson v. Mt. Clemens Pottery Co., 328 7 U.S. 680, 687 (U.S. 1946). "Once the employee 'has proved that he has performed work and has not 8 been paid in accordance with the [FLSA],' the fact of damage is certain." Brock v. Seto, 790 F.2d 9 1446, 1448 (quoting Mt. Clemens Pottery, 328 U.S. at 688). As entry of default renders all of 10 plaintiff's factual allegations true for purposes of default judgment, plaintiff's burden is satisfied. 11 The only uncertainty is the amount of damage. Id.

12 Plaintiffs seek liquidated damages under FLSA, 29 U.S.C. 216(b), which mandates an award of 13 liquidated damages equal to the amount of unpaid overtime, not as a penalty but to compensate the 14 employee for damages too difficult to calculate. King v. Board of Education, 435 F.2d 295, 298 (7th 15 Cir. 1970); Docket No. 18, p. 8. For a willful violation, which plaintiffs have alleged in this case, the 16 applicable statute of limitations is three years. 29 U.S.C. § 255; see also Docket No. 18, p. 9. 17 Therefore, plaintiffs are entitled to overtime compensation for any hours worked on or after June 25, 18 2007, three years prior to the filing of this suit.

19 Plaintiffs also seek 30 days of wages apiece under Cal. Lab. Code § 201-03, which imposes 20 liability on an employer who fails to pay discharged employees all wages owed upon termination or 21 within 72 hours of being laid off. Cal. Lab. Code § 202; Docket No. 18, p. 13. This penalty payment 22 is nondiscretionary and will be awarded for every day the employer fails to pay the terminated 23 employees the wages owed, up to thirty days. See Morris v. County of Marin, 18 Cal.3d 901 (1977) 24 (finding that the penalty is mandatory). Thus, plaintiffs are entitled to 30 days of wages because 25 more than 30 days have passed since their termination, during which time defendants have not 26 tendered the wages owed.

27 Next, plaintiffs seek three years of unpaid overtime under Cal. Lab. Code § 510. Docket No. 18, 28 p. 7-8. However, since they also seek four years of unpaid overtime as restitution under Cal. Bus. &

1 Prof. Code § 17203 (the “California Unfair Competition Law” or “UCL”), the claim for wages  
2 under Cal. Lab. Code § 510 is subsumed by the claim for restitution. Id. at 8, 14-15. Under the UCL,  
3 any “money or property . . . which may have been acquired by means of [] unfair competition” is  
4 recoverable as restitution up to four years after the claim accrued. Cal. Bus. & Prof. Code §§ 17203,  
5 17208. Wages are recoverable, and courts favor UCL suits over claims under statutes with shorter  
6 statutes of limitations. See, e.g., Cortez v. Purolater Air Filtration Products Co., 23 Cal.4th 163, 173  
7 (permitting a party to bring a claim for unpaid wages under Cal. Bus. & Prof. Code § 17000 *et seq.*  
8 as a restitutionary claim with a four-year statute of limitations rather than bringing a claim for  
9 damages under a statute with a shorter statute of limitations). Thus, plaintiffs are entitled to  
10 compensation for unpaid overtime hours that they worked on or after June 25, 2006. In addition,  
11 they claim restitution for unpaid missed meal periods. Docket No. 18, p. 20. Employees may  
12 recover for these unpaid missed meal times under Cal. Lab. Code § 226.7. However, since these  
13 constitute wages, plaintiffs can instead bring suit under the UCL and avail themselves of its four  
14 year statute of limitations. See Tomlinson v. Indymac Bank, F.S.B., 359 F. Supp. 2d.891, 896-97  
15 (C.D. Cal 2005) (finding that unpaid missed meal periods are wages recoverable under the UCL).  
16 Thus, plaintiffs are also entitled to restitution for any missed meal periods occurring on or after June  
17 25, 2006.

18 Finally, plaintiffs seek actual damages under Cal. Lab. Code § 226, governing pay statement  
19 violations. Plaintiffs have alleged that they were not provided with pay statements, entitling them to  
20 “all actual damages . . . not exceeding an aggregate penalty of four thousand dollars” for each  
21 employee “suffering injury.” Cal. Lab. Code § 226(e). Lost wages are a form of actual damages.  
22 Cornn v. United Parcel Service, Inc., 2006 WL 449138, \*3 (N.D. Cal. Feb. 22, 2006). As each of  
23 them alleges a loss of greater than \$4,000 in actual wages, they all claim the statutory maximum.  
24 Docket No. 18, p. 24.

25 Plaintiffs claim that they are owed for unpaid overtime hours and missed meal periods as  
26 follows:

27 1. Martin Delgado

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1 Martin Delgado claims \$6,213 in liquidated damages for overtime hours worked from June 25, 2007  
2 through February 7, 2009 under FLSA's three year statute of limitations. Docket No. 18, p. 10. He  
3 claims \$2,160 owed as a penalty under Cal. Lab. Code § 203. Id. at 14. Next, he claims \$9,801.63 in  
4 restitution for unpaid wages from June 25, 2006 through February 9, 2009 under the UCL's four  
5 year statute of limitations. Id. at 16. He also claims \$4,000, the statutory maximum, for pay  
6 statement violations. Id. at 24. In total, Martin Delgado seeks \$22,174.63.

7 2. Adrain Acoltzi

8 Acoltzi claims \$14,411.50 in liquidated damages for overtime hours worked from July 15, 2008  
9 through March 15, 2010 under FLSA's three year statute of limitations. Docket No. 18, pp. 10-11.  
10 He claims \$2,280 owed as a penalty under Cal. Lab. Code § 203. Id. at 14. Next, he claims  
11 \$31,312.50 in restitution for unpaid wages from July 15, 2007 through March 15, 20120 under the  
12 UCL's four year statute of limitations. Id. at 16-17. He also claims \$10,020 in restitution for unpaid  
13 missed meal periods. Id. at 21. He also claims \$4,000, the statutory maximum, for pay statement  
14 violations. Id. at 24. In total, Acoltzi seeks \$62,024.00.

15 3. Angel Martinez

16 Martinez claims \$ 26,098.15 in liquidated damages for overtime hours worked from June 25,  
17 2007 through October 15, 2009 under FLSA's three year statute of limitations. Docket No. 18, pp.  
18 11-12. He claims \$2,160 owed as a penalty under Cal. Lab. Code § 203. Id. at 14. Next, he claims  
19 \$208,350.00 in restitution for unpaid wages from June 25, 2006 through October 15, 2009. Id. at 17-  
20 19. He also claims \$14,796 in restitution for unpaid missed meal periods. Id. at 21-23. He also  
21 claims \$4,000, the statutory maximum, for pay statement violations. Id. at 24. In total, Martinez  
22 seeks \$255,404.15.

23 4. Ricardo Delgado

24 Ricardo Delgado claims \$2,958.75 in unpaid wages from June 26, 2006 through January 15, 2007.  
25 Id. at 19. Next, he claims \$1,183.50 in restitution for unpaid missed meal periods. Id. at 23. He also  
26 claims \$4,000, the statutory maximum, for pay statement violations. Id. at 24. In total, Ricardo  
27 Delgado seeks \$8,142.25.

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1       The court is satisfied that plaintiffs have provided sufficient evidence of the damages they  
2 request, and recommends that plaintiffs be awarded a total sum of \$347,745.03, to be divided among  
3 them as listed above.

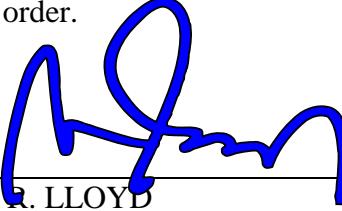
4       **CONCLUSION**

5       Because all parties have yet to consent to the undersigned's jurisdiction, this court ORDERS the  
6 Clerk of Court to reassign this case to a district court judge. The undersigned further  
7 RECOMMENDS that the newly assigned district court judge enter default judgment against  
8 defendants for the total amount of \$347,745.03. The motion hearing set for November 29, 2011 is  
9 hereby VACATED.

10       Pursuant to Civil L.R. 72(b), any party may serve and file objections to this report and  
11 recommendation within fourteen days of the date of this order.

12       **IT IS SO ORDERED.**

13       Dated: November 23, 2011

14         
HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

1 **C10-02799 HRL Notice will be electronically mailed to:**

2 Adam Wang adamqwang@gmail.com  
3 Adam Lee Pederson alpedersen@gmail.com

4 **Counsel are responsible for distributing copies of this document to co-counsel who have not  
registered for e-filing under the court's CM/ECF program.**

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